

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Promoting the Availability of Diverse and) MB Docket No. 16-41
Independent Sources of Video Programming)
)

COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

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I. Introduction

Writers Guild of America, West, Inc. (“WGAW”) welcomes the opportunity to comment on the Federal Communication Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, MB Docket No. 16-41.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television, news, documentaries and digital media. WGAW advocates for a competitive media marketplace that allows diverse writers to reach, entertain and inform the public. Our members and the members of our affiliate, Writers Guild of America, East (jointly, “WGA”) create nearly all of the entertainment programming viewed on television today as well as most of the original scripted series now offered by online video distributors (“OVDs”) such as Netflix, Hulu, Amazon, Crackle and more.

We support the Commission’s decision to open a rulemaking proceeding regarding abusive practices by large multichannel video programming distributors (“MVPDs”). The extraction of unconditional most favored nation provisions (“MFNs”) and unreasonable alternative distribution method (“ADM”) provisions from independent programmers suggest that consolidated market power is undermining competition, innovation and consumer choice in the market for video programming. Such contract provisions harm independent programmers who lack the power to resist these conditions and inhibits competition from smaller MVPDs and affordable, consumer-friendly OVDs seeking to offer greater programming choices.

The Commission has expressed concern about the potential for such abuses in the past and imposed prophylactic measures on an ad hoc basis. In the Charter-Time Warner Cable

merger, for example, the Commission prohibited Charter from making or enforcing programming agreements that restricted online distribution rights.¹ Given the extent of media consolidation and the Commission’s mandate under Section 257 to create a competitive and diverse media marketplace,² an industry-wide rule prohibiting unconditional most favored nation provisions and unreasonable alternative distribution method provisions will help limit the gatekeeper power of large MVPDs, protect independent programmers and promote competition.

II. The consolidated nature of the television industry warrants Commission action

The television industry is highly concentrated, with only a handful of companies dominating programming and distribution. Recent mergers between large MVPDs have exacerbated this reality. How did we get here? From 1970 to 1995, the Commission explicitly protected independent producers of television programming through the Financial Interest and Syndication (“Fin-Syn”) rules. However, the advent of new broadcast networks, new local stations, the off-network and first-run syndication markets, and cable television eroded the Big Three broadcast networks’ market position and motivated the repeal of Fin-Syn.³ Liberalized ownership restrictions led to the rolling up of broadcasters, studios, cable networks, and local stations into large media conglomerates. Viacom acquired Paramount in 1994 and merged with CBS in 1999, Disney purchased Capital Cities/ABC in 1995, Time Warner purchased Turner Broadcasting in 1996, and NBC combined with Universal in 2003. The trend continues today as

¹ *U.S. v. Charter Communications, Inc. et al.*, Proposed Final Judgment, Civil Action No. 16-cv-00759 at 5, Section IV.B.2 (2016).

² 47 U.S.C. § 257.

³ In re: Review of the Syndication and Financial Interest Rules, *Report and Order*, MM Docket No. 95-39, 10 FCC Rcd. 12165, 12165 n.5 (1995).

mini-majors are eliminated as independent competitors—NBCU acquired DreamWorks Animation in April for \$3.8 billion, Dalian Wanda acquired Legendary Entertainment and Dick Clark Productions for \$3.5 billion and \$ 1 billion respectively, and Lions Gate just finalized its acquisition of Starz for \$4.4 billion.

Meanwhile downstream, MVPDs rolled up smaller systems into ever larger MVPDs, culminating in two of the largest mergers in telecom history. AT&T combined its 5.9 million video subscribers with DirecTV's 20.4 million subscribers in a \$49 billion transaction in 2014 that created the largest MVPD in the United States.⁴ In a \$55 billion transaction two years later, Charter combined its 4.2 million video subscribers with Time Warner Cable's 10.8 million video subscribers and Bright House Network's 2 million video customers⁵ to create the third largest MVPD in the country. In 2002, the three largest cable companies controlled 39% of all basic subscribers; by 2016, they controlled 83% of basic cable subscribers.⁶ Between 2011 and 2016 alone, the top 3 MVPDs increased their market share from 55% of all basic subscribers to 79%.⁷

Extreme consolidation makes it notoriously difficult for smaller programmers to compete, even ones with wealthy backers. Research by Tasneem Chipty presented at the FCC Media Bureau's Workshop on the State of the Video Marketplace demonstrates that "[Non-broadcast] networks launched by 'large' content owners were significantly more likely to survive relative to networks launched by 'small' content owners: 86% for large owners versus 55% for

⁴ AT&T Inc., 2014 Annual Report (Form 10-K) at 10 (Feb. 20, 2015); DirecTV Inc., 2014 Annual Report (Form 10-K) at 3 (Feb. 25, 2015).

⁵ In the Matter of Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, *Public Interest Statement*, MB Docket No. 15-149, at 7-10 (filed June 25, 2015).

⁶ SNL Kagan, "U.S. Cable Subscriber Highlights," Accessed Dec. 16, 2016.

⁷ WGAW calculation based on SNL Kagan data.

small owners.”⁸ Al Jazeera America shut down. The Tennis Channel sold itself to Sinclair Broadcast Group. Billionaire media mogul, Oprah Winfrey, regretted launching her own cable network despite joint ownership with Discovery Communications: “I didn’t think it was going to be easy [but]...had I known it was this difficult, I might have done something else.”⁹ If Oprah nearly failed, how open are these markets to new entrants in today’s horizontally- and vertically-integrated media industry?

Independent programmers are being crowded out of legacy platforms by media consolidation. Horizontally-integrated programmers leverage their control over “must have” programming into carriage of affiliated networks; vertically-integrated programmers are favored by affiliated MVPDs. Of the 99 cable networks that reached 50 million or more households in 2015, 79 (80%) were affiliated with a large media conglomerate¹⁰ or an MVPD.¹¹ Among the twenty most widely distributed cable networks in 2015, 17 (85%) were affiliated with either a large media conglomerate or an MVPD.¹²

⁸ Tasneem Chipty. *Position Statement Prepared for The Federal Communication Commission’s Panel on Challenges Faced by Multichannel Video Programming Distributors*, Second Media Bureau Workshop on the State of the Video Marketplace at 6 (Apr. 25, 2016), available at https://transition.fcc.gov/bureaus/mb/docs/policy/video_marketplace/position_statement_ChIPTy_2016.pdf.

⁹ Kimberly Potts, *Oprah Winfrey: I Didn’t Know Starting a Network Would Be So Hard*, The Wrap (Apr. 2, 2012), <http://www.thewrap.com/oprah-i-might-not-have-done-own-if-i-knew-how-difficult-it-would-be-video-36717/>.

¹⁰ Fox, CBS, Viacom, Disney, Comcast and Time Warner.

¹¹ Writers Guild of America, West, Inc., Comments in the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming, *Notice of Inquiry*, MB Docket No. 16-41, at 9 (Mar. 30, 2016) (“NOI Comments”).

¹² *Id.*

Not surprisingly, independent and diverse sources of programming fare better on OVDs than on legacy media platforms. Independent productions¹³ accounted for only 5% of original scripted series on primetime broadcast television in the 2014-2015 season.¹⁴ Basic Cable and Pay TV offered consumers slightly more diversity with 12% of all scripted series originating from independent sources.¹⁵ In contrast, independent producers accounted for 49% of TV-length original scripted series released by OVDs during the 2014-2015 season.¹⁶ OVDs offered consumers the largest number of independently produced original TV-length scripted series of any media platform.

The tendency of media conglomerates to air programming produced and owned by affiliated studios further limits choice on legacy platforms. Among scripted series airing in the 2014-2015 season, 73% of Pay TV, 68% of Network Primetime, and 60% of Basic Cable originated in-house.¹⁷ In contrast, only 23% of TV-length scripted series released by OVDs during the 2014-2015 season originated in-house.¹⁸ Fourteen different production companies reached the public via OVD in the 2014-2015 season, including smaller studios such as Media Rights Capital (*House of Cards*), Gaumont International Television (*Narcos*), and The Tornante Company (*BoJack Horseman*).¹⁹

¹³ Independent productions are defined as series produced by a company that is neither affiliated with an MVPD nor with a large media conglomerate and which retains the copyright to the series.

¹⁴ NOI Comments at 13

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 14.

¹⁸ *Id.* at 15.

¹⁹ *Id.*

III. The Commission should restrict the use by MVPDs of contract terms that harm competition and limit the availability of diverse and independent programming

Given the consumer appeal of OVD programming, affordability, and convenience, OVDs pose a competitive threat to incumbent MVPDs—a fact highlighted in past proceedings by numerous commentators as well as the Commission itself.²⁰ Large MVPDs have an incentive to abuse their market power to undermine competition and limit programming availability.²¹ Recent

²⁰ *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5662, ¶ 140 (2015) (“*2015 Open Internet Order*”); Comments of the Writers Guild of America, West, Inc., MB Docket No. 10-56, at 17-19 (filed June 21, 2010); Petition to Deny of DISH Network, MB Docket No. 15-149, at 4, 15-20, 46-55, 68 (filed Oct. 13, 2015) (“*DISH Petition*”); Petition to Deny of Free Press, MB Docket No. 15-149, at 18, 23-39 (filed Oct. 13, 2015) (“*Free Press Petition*”); Petition to Deny of Public Knowledge, Common Cause, Consumers Union, and Open Mic, MB Docket No. 15-149, at 6-18 (filed Oct. 13, 2015) (“*Public Knowledge et al. Petition*”); Petition to Deny of Writers Guild of America, West, Inc., MB Docket No. 15-149, at 13-16, 23-30 (filed Oct. 13, 2015) (“*WGAW Petition*”); Reply to Opposition to Petition to Deny of Free Press, MB Docket No. 15-149, at 5 (filed Nov. 11, 2015) (“*Free Press Reply*”); Reply to Opposition to Petition to Deny of Public Knowledge, MB Docket No. 15-149 at 2-6 (filed Nov. 11, 2015) (“*Public Knowledge Reply*”); Reply Comments of Writers Guild of America West, Inc., MB Docket No. 15-149 at 20-22 (filed Nov. 11, 2015) (“*WGAW Reply*”); Letter from Stop Mega Cable Coalition to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149, at 2, 6 (filed Feb. 9, 2016) (“*Stop Mega Cable Coalition Feb. 9, 2016, Ex Parte Letter*”); Letter from Ellen Stutzman, Senior Director of Research and Public Policy, WGAW, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149, at 2-5 (filed Feb. 10, 2016) (“*WGAW Feb. 10, 2016, Ex Parte Letter*”); Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH Network Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149, at 2 (filed Feb. 26, 2016) (“*DISH Feb. 26, 2016, Ex Parte Letter*”).

²¹ Petition to Deny of DISH Network Corporation, MB Docket No. 15-149, at 63-65 (filed Oct. 12, 2015); Petition to Deny of COMPTTEL, MB Docket No. 15-149, at 5-13 (filed Oct. 12, 2015); WGAW Reply at 16-17, 24; Comments of Cincinnati Bell Extended Territories, LLC, MB Docket No. 15-149 at 2-3, 10-11, 15 (filed Oct. 12, 2015); Comments of Hawaiian Telecom Services Company, Inc., MB Docket No. 15-149 at 17-20 (filed Oct. 12, 2015); Reply of Cincinnati Bell Extended Territories LLC, MB Docket No. 15-149, at 1-6 (filed Nov. 11, 2015); Reply Comments of Hawaiian Telecom Services Company, Inc., MB Docket No. 15-149, at 3-5 (filed Nov. 11, 2015); Reply of INCOMPAS, MB Docket No. 15-149, at 6-8 (filed Nov. 11, 2015); Replies of the National Association of Broadcasters, MB Docket No. 15-149, at 2-8 (filed Nov. 11, 2015); Reply of NTCA—The Rural Broadband Association to Response/Opposition to Petition to Deny, MB Docket No. 15-149, at 4-6 (filed Nov. 11, 2015); Public Knowledge Reply at 7-9; WGAW Reply at 26; Letter from Charles Herring, President,

antitrust charges filed by the Justice Department suggest that MVPDs can and do engage in such behavior. The Justice Department alleges that DirecTV, Cox Communications, Charter Communications, and AT&T illegally colluded in a boycott of SportsNetLA, which deprived Los Angeles consumers of access to Dodgers baseball games.

The Charter-Time Warner Cable merger proceeding and the Notice of Inquiry in the Matter of Promoting the Availability of Diverse and Independent Sources of Video Programming uncovered evidence that unconditional MFNs and unreasonable ADMs present market barriers to OVDs.²² Small MVPDs and OVDs report difficulties accessing programming at affordable rates which hinders them in competition with large MVPDs and makes it harder for independent programmers to monetize their content. The Commission anticipated these sorts of abusive contractual provisions in the Comcast-NBCU merger proceedings where it prohibited any

Herring Networks, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149, at 2-3 (filed Dec. 18, 2015) (“Herring Networks, Dec. 18, 2015, *Ex Parte* Letter”); Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, MB Docket 15-149, at 1-2 (filed Feb. 7, 2016); Stop Mega Cable Coalition Feb. 9, 2016, *Ex Parte* Letter at 2, 6, 10; WGAW Feb. 10, 2016, *Ex Parte* Letter at 3-5; Letter from David Goodfriend on behalf of BeIN SPORTS and Sports Fans Coalition, to Marlene H. Dortch, Secretary, FCC, MB Docket 15-149, at 1 (filed Feb. 15, 2016) (“beIN SPORTS Feb. 15, 2016, *Ex Parte* Letter”); Letter from David Goodfriend on behalf of BeIN SPORTS and Sports Fans Coalition, to Marlene H. Dortch, Secretary, FCC, MB Docket 15-149, at 1 (filed Mar. 16, 2016) (“beIN SPORTS and Sports Fans Coalition Mar. 16, 2016, *Ex Parte* Letter”); Letter from David Goodfriend to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149, at 1 (filed Mar. 21, 2016) (“beIN SPORTS Mar. 21, 2016, *Ex Parte* Letter”); DISH Feb. 26, 2016, *Ex Parte* Letter at 2.

²² DISH Petition at 64-65, 68; Public Knowledge et al. Petition at 12-14; WGAW Reply at 26; Public Knowledge Reply at 3, 5-9; beIN SPORTS and Sports Fans Coalition Feb. 15, 2016, *Ex Parte* Letter at 1; beIN SPORTS and Sports Fans Coalition Mar. 16, 2016, *Ex Parte* Letter at 1; beIN SPORTS Mar. 21, 2016, *Ex Parte* Letter; DISH Feb. 26, 2016, *Ex Parte* Letter at 2; Stop Mega Cable Feb. 9, 2016, *Ex Parte* Letter at 10; RFD-TV Comments, MB Docket No. 16-41, at 2-3, 21 (filed Mar. 29, 2016); beIN SPORTS Reply, MB Docket No. 16-41, at 11, 15, (Apr. 18, 2016); Free Press Reply, MB Docket No. 16-41, at 4 (Apr. 18, 2016); INSP Comments, MB Docket No. 16-41, at 16-19, 22 (Mar. 29, 2016); KSE Media Ventures Comments, MB Docket No. 16-41, at 4-6 (Mar. 29, 2016); Pac-12 Network Reply, MB Docket No. 16-41, at 4 (Apr. 18, 2016); beIN SPORTS Reply Comments, MB Docket No. 16-41, at 2, 6 (Apr. 18, 2016).

Comcast-NBCU programmer from entering into or enforcing “any agreement or arrangement...which forbids, limits, or creates economic incentives to limit the distribution of such Video Programming through OVDs.”²³ The Commission reiterated its opposition to anticompetitive MFNs and ADMs in the Charter-Time Warner Cable proceeding where it upheld a Department of Justice consent decree that “prohibits New Charter from enforcing or entering into agreements with programmers that restrict online distribution rights, except under limited circumstances.”²⁴

The market barriers erected by unconditional MFNs and unreasonable ADMs require redress under the Communications Act. Section 257 tasks the Commission with creating a competitive and diverse media marketplace in the public interest and requires the elimination of market barriers confronting entrepreneurs and small businesses. The recent executive order *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy*²⁵ establishes the promotion of competition as a priority across the federal government and encourages all agencies to take concrete steps to enhance competition in their jurisdiction. As the Commission has already recognized the problems with unconditional MFNs and unreasonable ADMs in past merger reviews, it is a logical and necessary next step to extend such prohibitions across the industry. By doing so, the Commission will provide a level playing field that enables smaller MVPDs and OVDs to secure programming

²³ In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, MB Docket No. 10-56, 26 FCC Rcd.4238-4516 ¶ Appendix A(b)(1) (2011).

²⁴ In the Matter of the Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, *Memorandum Opinion and Order*, MB Docket No. 15-149 (2016).

²⁵ Exec. Order No. 13725, 3 C.F.R 23417-23419 (2016)

and enables independent programmers to unlock revenue with which to develop more diverse content.

IV. Conclusion

Television programming and distribution is controlled by a handful of media conglomerates with the incentive and market power to undermine competition in the video marketplace. This is a profoundly worrisome development not just for consumers and competitors but for American democracy itself. The WGAW applauds the Commission's efforts to prohibit anticompetitive contract provisions and encourages the Commission to continue working to enhance competition in our media markets so that diverse and independent voices reach the public.